

U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036



DATE: SEP 30, 1988
CASE NO. 87-INA-714

IN THE MATTER OF

SHAW'S CRAB HOUSE,
Employer

ON BEHALF OF

SAMUEL DURAN,
Alien

Richard J. Puchalski, Esq.
Chicago, Illinois
For the Employer

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge;
and Brenner, DeGregorio and Tureck,
Administrative Law Judges

JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER

This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) (hereinafter "the Act"). The Employer requested review, from U.S. Department of Labor Certifying Officer Wellington C. Howard's denial of a labor certification application pursuant to 20 C.F.R. §656.26.¹

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work; and (2) the employment of the alien will not adversely

¹ All of the regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of §656.21 of the regulations have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means, in order to make a good faith test of U.S. worker availability.

This review of the denial of a labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties. [See §656.27(c)].

Statement of the Case

On August 12, 1986 the Employer, a seafood restaurant located in Chicago, filed an application for alien employment certification (AF 35-38) to enable the Alien to fill the position of seafood specialty chef. Two years of prior experience in seafood preparation was required.

Following the issuance of the Notice of Findings ("NOF") by the Certifying Officer on March 26, 1987 (AF 28-30), and the Employer's filing of its rebuttal on July 29, 1987 (AF 14-24), the Final Determination denying certification was issued on August 7, 1987 (AF 6).

Discussion

In response to Employer's recruitment efforts, seven applicants contacted the State Office² (AF 33). Four of these applicants were interviewed by Employer and rejected as lacking the required experience (AF 48-49); three other State Office referrals, Messrs. Manning, Salgado and Travan, allegedly failed to appear for interviews (AF 49). The State Office mailed questionnaires to Manning, Salgado, and Travan; only Travan responded. In his March 13, 1987 statement, Travan claimed that his repeated attempts to contact Employer went unanswered (AF 47). On March 27, 1987, the Employer wrote to the State Office saying that it had no record of any of the latter three applicants contacting it (AF 19).

The NOF required, inter alia, documentation that Employer's requirement of a background in seafood preparation represented the job's actual minimum requirement. In this regard, the Certifying Officer noted that the Alien's only previous experience before working at Shaw's Crab House was as a chef at another restaurant, R.J. Grunts, which had a general menu (AF 13; see also AF 50-54). The Certifying Officer also noted that one of the job applicants, Travan, stated that employer refused to interview him. In rebuttal, Employer maintained that the Alien met the experience requirement necessitated by Employer's specialization in seafood. Employer also

² As used in this Decision and Order, "State Office" refers to the Illinois Department of Employment Security.

submitted a letter from Stephen La Haie, representing himself as the General Manager of R.J. Grunts (AF 16), as documentation that the Alien did specialize in seafood preparation while employed there. Employer also denied that Travan called to request an interview (AF 15). The Final Determination denied certification on the grounds initially raised in the Notice of Findings.

In regard to the issue of the requirement of two years of experience as a chef specializing in seafood preparation, the Certifying Officer has not challenged the reasonableness of that requirement. Rather, he found that it was not Employer's actual minimum requirement, based on his finding that the Alien's experience at R.J. Grunts did not involve any special experience in seafood preparation. To bolster his position, the Certifying Officer described his efforts in attempting to verify the substance of Mr. La Haie's letter submitted in rebuttal of the NOF. He stated that he personally telephoned that restaurant and spoke to a Mr. Bnaakis, who said he was the owner, and was informed that Mr. La Haie "was not employed there." (AF 5). The Certifying Officer went on to state that "[i]n a subsequent telephone call the woman who answered the telephone stated they did not serve seafood specialties at the restaurant." (*Id.*, emphasis in original).

Since this evidence was first cited in the Final Determination, employer was not given an opportunity to rebut it before the Certifying Officer. We have previously held that an employer must be advised of the evidence being used against it, so that it may have an opportunity to rebut that evidence. See The Little Mermaid Restaurant, 87-INA-675 (March 9, 1988). In its brief to this Board, Employer noted this procedural deficiency and attached evidence which addresses the questions raised by the Certifying Officer's new evidence (see Employer's Memorandum in Support of the Labor Certification Appeal, Exhibit C). This evidence, if credited, would support Employer's position that the Alien has experience as a seafood chef for at least some period of time. Therefore, this evidence must be considered by the Certifying Officer.

Accordingly, the Certifying Officer's denial of certification is vacated, and the case is remanded for consideration of Employer's evidence.³

ORDER

The Certifying Officer's denial of certification is vacated, and the case is remanded for further consideration consistent with this opinion.

JEFFREY TURECK
Administrative Law Judge

JT/DN/jb

³ Although this decision does not resolve the issue of whether job applicant Travan contacted Employer and was refused an interview, the resolution of the issue of whether the Alien has two years of experience in seafood preparation may make Employer's dealings with Mr. Travan moot. For there is no indication that either Mr. Travan or any of the other applicants had experience in seafood preparation; nor does it appear that Employer, who interviewed four other applicants, acted in bad faith in failing to interview Travan.

Nevertheless, should this issue still be relevant on remand, the Certifying Officer is instructed to carefully explain his evaluation of the evidence concerning Travan's dealings with Employer.